SERVED: February 24, 1994

NTSB Order No. EA-4086

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of February, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. HOWARD HARDING, Respondent.	Docket SE-12275

OPINION AND ORDER

The respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on March 23, 1992, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed the allegations contained in the Administrator's order, but modified the sanction from revocation to a suspension of respondent's commercial pilot certificate for

[1]An excerpt of the hearing transcript containing the oral initial decision and order is attached.

a period of eight months.[2] For the reasons that follow, we will deny the appeal and affirm the law judge's initial decision and order.

The Administrator's order, which served as the complaint in this matter, alleged in pertinent part as follows:

> 2. On or about July 24, 1989, you acted as pilot-in-command of a Cessna A188B aircraft, N79127, on an agricultural dispensing operation in the vicinity of Dinosaur National Park, Roosevelt, Utah.
>
> 3. At the time of this flight you did not hold an Agricultural Operator Certificate issued under Part 137 of the Federal Aviation Regulations.
>
> 4. At the time of this flight you did not hold a current FAA medical certificate appropriate for agricultural operations. (Your second class medical certificate issued on April 7, 1988 expired on April 30, 1989.)
>
> 5. During this flight you operated N79127 within 500 feet of persons, vehicles, and structures located in and around Dinosaur National Park, when not necessary for takeoff or landing, or reasonably necessary for your dispensing operation.
>
> 6. Your operation of N79127 as described above was careless or reckless, endangering the lives and property of others.

The Administrator alleged that, as a result of the above-described conduct, respondent violated sections 137.11(a), 61.3(c), 91.79(c), and 91.9 of the Federal Aviation Regulations

[2]The Administrator, who has filed a reply to respondent's appeal brief, has not appealed the sanction modification.

(FAR), 14 C.F.R. Parts 137, 61, and 91.[3]

Respondent filed an answer to the complaint in which he generally denied the allegations and in which he also raised two affirmative defenses. Respondent's first "affirmative defense," related to the sanction of revocation, is no longer pertinent to this proceeding as a result of the law judge's sanction modification. Respondent's second affirmative defense was that during the agricultural spraying operation in question, he was employed by Mr. Robert Krissman, the holder of an agricultural aircraft operator certificate issued under FAR Part 137. At the

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[3]FAR §§ 137.11(a), 61.3(c), 91.79(c)[now codified at §§ 91.119(c)] and 91.9 [now codified at § 91.13(a)] provided at the time of the incident in pertinent part as follows:

§ 137.11 Certificate required.

(a) Except as provided in paragraphs (c) and (d) of this section, no person may conduct agricultural aircraft operations without, or in violation of, an agricultural aircraft operator certificate issued under this part.

§ 61.3 Requirement for certificates, rating, and authorizations....

c) Medical certificate....[N]o person may act as pilot in command...of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under Part 67 of this chapter....

§ 91.79 Minimum safe altitudes: general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes....

(c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

beginning of the hearing, respondent admitted the factual allegations contained in paragraphs 2, 3, and 4 of the complaint.

The Administrator presented the testimony of two National Park Service Rangers who testified that on the day in question, as they drove together to work at the Dinosaur National Monument, respondent's aircraft came within a few hundred feet of their vehicle horizontally, then banked and flew over them at an altitude of 50 to 75 feet above ground level. One of these rangers also testified that he was concerned because the aircraft was being operated over the park's housing area, in which approximately 25 people were living.[4] A third ranger testified that respondent operated N79127 directly over her head, at an altitude the height of a "two-story building," as she walked to work. She further testified that as she approached the park's fee collection station, respondent made a turn and was then about "two power poles" in altitude above her. An FAA inspector testified that respondent told him that "at no time did he fly below 200 feet over any of the structures." Respondent's only defense to the low flight allegation is that he maneuvered the aircraft as best he could, given the fact that if he had turned elsewhere he could not have avoided the hilly terrain.

As to the Administrator's Part 137 allegation, Robert Krissman, the individual who respondent claims was his employer, testified for the Administrator that respondent did not work for

[4]The law judge also considered a statement from one of the housing area's residents, who observed respondent's aircraft at 100 feet above tree level.

him at the time of the July agricultural spraying operation. According to him, respondent worked for him only until the end of June, 1989. At that time, he claims that he gave respondent his aircraft as compensation for their last spraying operation together, in June 1989. The law judge thereupon questioned FAA counsel as to his purpose for presenting this witness, stating that "the only issue is 91.79." [the low flight allegation]. Respondent's counsel then reminded the law judge of respondent's affirmative defense to the Part 137 allegation. The law judge suggested that respondent call Mr. Krissman in his case in chief. (Transcript 62-64). Following the testimony of an FAA inspector concerning the low flight allegation, the Administrator rested. Respondent's counsel then raised an objection because Mr. Krissman appeared to have been listening at the door, contrary to the law judge's earlier sequestration order. The law judge stated that he would deal with the issue when the witness was recalled.

In support of his claim that the July spraying operation was conducted under Mr. Krissman's certificate, respondent produced a Part 137 certificate which was issued to Mr. Krissman by the FAA on June 30, 1989. Respondent testified that this certificate was in the aircraft on July 24, 1989. Respondent also produced an insurance contract showing that the subject aircraft was insured by Mr. Krissman from May 1989, to May 1990. Finally, respondent produced a bill of sale transferring title of the aircraft to him, from Mr. Krissman's wife, on September 16, 1989. Respondent

admitted that he negotiated all of the arrangements for the July spraying operation and that the check for the job was made out to him only. He claimed however, that he paid a portion of the proceeds to Mr. Krissman. He could not, however, remember how much he paid Krissman, nor did he produce any evidence of payment. Respondent also admitted that he asked Krissman to sign a statement saying that he had given permission to respondent to use the Part 137 certificate.[5]

Mr. Krissman was then called as respondent's witness. Mr. Krissman testified that he took a job with Eastern Airlines and relocated to Miami by the end of June, 1989. He claimed that he was completely out of the agricultural spraying business by July, and he denied that respondent worked for him during the July operation. He also denied receiving any money from respondent for the July operation. Mr. Krissman admitted that he gave respondent permission to continue operating under his Part 137 certificate for the spraying contract performed in June 1989.[6]

The law judge affirmed the Administrator's allegations regarding the low altitude operation. He found that the rangers' testimony was corroborated by respondent's admissions, as well as the written statement made by the housing area resident. As to

[5]Another of Krissman's former employees states in an affidavit that in May 1989, he heard Krissman tell respondent that he could operate N79127 under Krissman's Part 137 certificate until respondent "got his own certificate or 1-1-90 whichever came first." (Respondent's Exhibit R-8).

[6]Mr. Krissman also testified that there was an earlier bill of sale for the aircraft, but respondent claimed that he had lost it and a new bill of sale was given to him.

the Part 137 allegation, the law judge rejected respondent's claim that he was still employed by Mr. Krissman during the July 24, 1989 operation, making an implicit credibility finding against respondent. The law judge also opined that even if Mr. Krissman had told respondent that he could operate under his Part 137 certificate, as a matter of law he could not, because the certificate states on its face that it is not transferrable. The law judge considered the evidence suggesting that respondent may have believed otherwise, as well as respondent's explanation for his inadvertent failure to have a current second-class medical certificate, in mitigation of sanction, and affirmed only an eight-month suspension.

Respondent raises several arguments on appeal. While not directly attacking the factual findings supporting the low flight allegations, he contends that these violations should nonetheless be set aside because of what he claims are procedural deficiencies which deprived him of due process. He argues that the law judge failed to instruct the witnesses on the meaning of his sequestration order, and that as a result, the order was violated by two of the Administrator's witnesses. Respondent also contends that the law judge was "confused as to the pleadings and the issues before the court," because the law judge did not recognize that respondent had raised affirmative defenses until it was brought to his attention during the hearing. In the Board's view, respondent's appeal borders on the frivolous.[7]

[7]Respondent's unexplained contention that a series of

The purpose of sequestering witnesses is to discourage and expose fabrication, inaccuracy, and collusion. See, Federal Rule of Evidence 615, Notes of Advisory Committee. Here, respondent claims that the third park ranger who testified spoke with the other two rangers during a recess, before she took the stand. According to respondent's appeal brief, the witnesses discussed the questions which had been asked of the first two witnesses, and respondent's counsel was aware of this activity prior to the conclusion of the hearing. However, respondent did not bring these facts to the law judge's attention, or object that the witness violated the order. In any event, any error which may have occurred because of the alleged violation of the sequestration order was harmless. The third park ranger testified only in regard to her own observations of respondent's aircraft. These observations took place at a completely different time and place than when respondent was seen by the first two witnesses. Thus, there is absolutely no basis for claiming collusion among these witnesses, nor does respondent even suggest that he was actually prejudiced by these out-of-court discussions.[8] Similarly, respondent's claim that he was harmed because Mr. Krissman listened to the testimony regarding the low flight allegations, or that this breach somehow casts

(..continued)
insignificant typographical errors in the hearing transcript prejudiced him is frivolous.

[8]If respondent's counsel believed that instructions were necessary to enforce the sequestration order he should have raised the issue to the law judge.

doubt on his credibility, is unavailing. Mr. Krissman testified only with regard to the Part 137 allegation, and there was no danger of collusion or fabrication even if he heard the park rangers' and the inspector's testimony. Further, respondent called Mr. Krissman as a witness without raising his concern that Mr. Krissman had heard testimony while outside the hearing room. He did not question Mr. Krissman as to whether he had heard prior testimony, and there is no record that Mr. Krissman did hear testimony while waiting to be recalled as a witness, other than the speculation of respondent's counsel made earlier in the proceeding. Because respondent offered no objection or request for relief prior to the conclusion of the hearing, any error which may have occurred was not preserved by respondent. Finally, there is no evidence in the record that the Administrator or Administrator's counsel was aware of or played a role in the witness' alleged hearing of prior testimony. In sum, even if were assumed that a record was made that a witness violated the sequestration order, and if respondent had timely objected to the testimony, the decision of whether to allow the witness to testify was within the sound discretion of the law judge. There has been no showing, or effort to show, that such discretion was abused.

Respondent also attacks these proceedings by arguing that the law judge was "confused" about the issues. We think this contention is completely unsupported by this record. While it may have been necessary for counsel to remind the law judge of

respondent's affirmative defense during the Administrator's case-in-chief, this was more a function of the fact that respondent changed his answer at the hearing to an admission of the facts as to paragraphs 2, 3, and 4 of the complaint, coupled with respondent's counsel's failure to give an opening statement at the beginning of the hearing when he could have apprised the law judge of his defense.

Finally, respondent attacks the law judge's implicit credibility finding against him on the question of whether he was still employed by Mr. Krissman in July 1989. Board precedent is clear that we will defer to the law judge's credibility findings unless they are made in an arbitrary or capricious manner. Administrator v. Smith, 5 NTSB 1560, 1563 (1986). We see no reason to disturb the law judge's credibility determination here. The law judge had the opportunity to see and evaluate the demeanor of the witnesses. Moreover, his conclusions are supported by the absence of any evidence corroborating respondent's claim that he had shared the proceeds of the July operation with Mr. Krissman.[9] We adopt the law judge's findings as our own.

[9]Since proof of that claim was critical to respondent's affirmative defense, he had the burden of going forward with such evidence.

ACCORDINGLY IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's order, as modified by the law judge, and the initial decision are affirmed; and

3. The eight-month suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[10]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[10]For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).